THE 2018/843 EU DIRECTIVE ON THE PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING AND ITS CORRELATION TO THE CRIMINAL LAW PREVENTION OF THE STOCK MARKETS[1]

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Abstract: The European Union's Fourth Anti-Money Laundering Directive came into force last year, on the 26th June 2017. The 4th AML Directive includes some fundamental changes to the anti-money laundering procedures, including changes to CDD, a central register for beneficial owners and a focus on risk assessments. "The Panama Papers and the recent terrorist attacks have shown that we urgently need better Anti-Money Laundering rules. Today's agreement will bring more transparency to improve the prevention of money laundering and to cut off terrorist financing. Better cooperation to fight these crimes will make the difference. I will also make sure that the existing and upcoming rules are enforced properly, otherwise they are just empty words" – said Věra Jourová, Commissioner for Justice, Consumers and Gender Equality.[3]

Key words: money laundering, terrorist financing, the 2018/843 EU directive

THE NEW AML/CFT EU DIRECTIVE

"The European Commission published on 5 July 2016 a proposal revising Directive (EU) 2015/849, the fourth Anti-Money Laundering Directive (4AMLD). The Council of the European Union agreed on its general approach on 20 December. The European Parliament's plenary session confirmed its committees' position on this draft law on 14 March 2017. An informal agreement between the institutions was reached on 13 December. This compromise document was endorsed by the Parliament on 19 April 2018 and by the Council on 14 May. The new Directive was adopted by the Parliament and the Council on 30 May 2018. The draft law sets out a series of measures to [illegible] transparency of financial transactions and of corporate entities under the existing legal

[11] Supported by the ÚNKP-18-4-III. new national excellence program of the ministry of human capacities".

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[3] https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=610991 (05.01.2019.)

framework in the European Union. It also sets out certain consequential changes to the relevant company law rules under Directive 2009/101/EC."[4]

The European Union's legislation therefore develops the rules against money laundering at an accelerating pace, which are also connected to the criminal law protection of the capital market. At the end of 2018, the EU issued a press release to summarize the origins of the 5th Anti-Money Laundering Directive and the new rules it introduced.

The Council "adopted a new anti-money laundering directive. This directive introduces new criminal law provisions which will disrupt and block access by criminals to financial resources, including those used for terrorist activities. The new rules include:

- establishing minimum rules on the definition of criminal offences and sanctions relating to money laundering. Money laundering activities will be punishable by a maximum term of imprisonment of at least 4 years, and judges may impose additional sanctions and measures (e.g. temporary or permanent exclusion from access to public funding, fines, etc.). Aggravating circumstances will apply to cases linked to criminal organizations or for offences conducted in the exercise of certain professional activities.
- the possibility of holding legal entities liable for certain money laundering activities which can face a range of sanctions (e.g. exclusion from public aid, placement under judicial supervision, judicial winding-up, etc.)
- removing obstacles to cross-border judicial and police cooperation by setting common provisions to improve investigations. For cross-border cases, the new rules clarify which member state has jurisdiction, and how those member states involved cooperate, as well as how to involve Eurojust.

Once the Directive is published in the EU official journal, member states have up to 24 months to transpose it into national law. This directive complements, on the criminal law aspects, the directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing which was formally adopted in May 2018."[5]

"The Fifth Directive is more of a series of amendments to the structure of the Fourth Directive, adding various additional provisions that weren't

[4] https://www.europeansources.info/record/directive-eu-2018-843-amending-directive-eu-2015-849-on-the-prevention-of-the-use-of-the-financial-system-for-the-purposes-of-money-laundering-or-terrorist-financing/ (12.02.2019.)

[5] https://www.consilium.europa.eu/en/press/press-releases/2018/10/11/new-rules-to-criminalise-money-laundering-activities-adopted/ (14.02.2019.)

included in the text of 4AMLD. The main changes are focused on enhanced powers for direct access to information and increased transparency around beneficial ownership information and trusts.

5MLD will bring in changes including:

- Regulating virtual currencies and pre-paid cards to prevent terrorist financing
- Improving safeguards for financial transactions to and from high risk countries
- Ensuring centralized national bank and payment account registers or central data retrieval systems are accessible in all member states."[6]

Hungary was the first from the Council for Mutual Economic Assistance (or Comecon) member states who enacted the regulations against money laundering in 1994. Since then the regulation has been numerously modified, but in spite of this the crime has not got significant practice. Annually, in average less than ten investigations begin with the suspect of money laundering. This activity was developed with capitalism in our country in the '90s.

The Hungarian anti-money laundering regulation, operating from 2017, can be found in two acts, in the Criminal Code (act C of 2012) and in the Act of Prevention of Financing Money Laundering and Terrorism (Act LIII of 2017). The previous mentioned Criminal Code contains presently two crimes in connection with money laundering and one crime in connection with terrorist financing.

The 5th EU AML/CFT Directive (2018/843 EU Directive on the prevention of money laundering and terrorist financing) and it's correlation to the criminal law prevention of the stock markets is a very interesting topic. In this article I will examine the possible the effectiveness of the Hungarian AML policy in the light of the new EU regulation and it's correlation to the criminal law prevention of the stock markets.

NEW REGULATIONS LAUNCHED BY THE 4TH AML/CFT DIRECTIVE

The fourth Anti-Money Laundering Directive (EU) No. 2015/849 entered into force on 26th June 2015. After it entered into force, Hungary started to make the new AML regulation. This is the Act LIII of 2017, which contains the most important elements of the new Hungarian AML regulation, and totally comply with the 4th EU Directive.

[6] https://vinciworks.com/blog/what-is-the-fifth-money-laundering-directive/ (13.02.2019.)

The key elements of the 4th Directive according to a recent article published in this topic are the followings:

"Under the 4th AMLD, a key role is accorded to the principle of risk analysis and the corresponding adequate safeguards. Both the EU Commission and jointly the European supervisory authorities EBA, EIOPA and ESMA (ESAs) shall conduct an analysis of money laundering and terrorism financing risks. The EU Commission is instructed to send its findings and its recommendations based on this analysis to the Member States and the obliged entities under the Directive so that the Member States can better understand and counteract such risks more effectively.

In addition, the 4th AMLD will also provide for an extension of the scope of anti-money laundering legislation requirements: for example, by reducing the threshold for cash transactions above which persons trading in goods qualify as 'obliged entities' and in particular in which an obligation to identify the customer is triggered. This threshold will be reduced from €15,000 to €10,000.

The 4th AMLD also extends its applicability to providers of gambling services which are now listed as 'obliged entities'. The Member States can, however, remove these providers – with the exception of casinos – partially or completely from the list of obliged entities if a low money laundering risk is evidenced.

The scope of the 4th AMLD is also extended by including as obliged entities not only real estate agents involved in the purchase or sale of real estate properties, but also those agents involved in the letting of real estate properties.

As regards beneficial ownership, the EU Member States are obliged under the 4th AMLD to create central registers containing information on the beneficial ownership of corporations, including Anglo-American trust structures.

The 4th AMLD provides that the competent national authorities (such as the Financial Intelligence Units) and obliged entities have to have access to the central register under the national anti-money laundering legislation for exercising their customer due diligence. Persons and organizations capable of evidencing a 'legitimate interest' in this information (e.g., an interest relating to money laundering) must get access to the central register except for information regarding trust structures.

The 4th AMLD no longer differentiates between politically exposed persons (PEPs) resident in the same country as the obliged entity and in other countries. Further, special obligations apply with respect to PEPs classified as beneficial owner. Furthermore, the 4th AMLD expands the category of PEPs to include members of the governing bodies of political parties, which will result in the necessity to update existing PEP lists.

Whilst already under the current European legislation, banks and certain other companies in the finance sector are obliged to establish group-wide compliance systems, including due diligence requirements relating to money laundering, this obligation will in future also apply to other obliged entities under the Directive.

As regards sanctions, the 4th AMLD is following an approach pursued in recent European legislation of requiring specific and far-reaching powers of the Member States to be exercised in case of non-compliance with the requirements of the Directive.

The approach of 'naming and shaming', which can likewise be observed more frequently in recent European legislation, is also being pursued. That means that the competent authorities shall publish the decisions based on breaches of the requirements laid down by the 4th AMLD, unless overriding reasons require an anonymous publication."[7]

THE MAIN ELEMENTS OF THE 5TH MAL/CFT DIRECTIVE

The 5th AML/CFT EU Directive brings many new elements into the national legislations of the member states from January 2020. A very good summary of the new elements is in a recent article:

"Criminal activities that constitute predicate offences for money laundering have been uniformly defined. The Directive provides for a two-layered system: first, Member States are obliged to consider predicate offences if a certain penalty threshold is met. Second, Member States are obliged to recognize 22 categories of offences listed in the Directive as criminal activity that constitutes predicate offences for money laundering. The Directive here partly refers to offences as set out in other legal acts of the Union;

Member States are obliged to include virtual currencies under "property" that may be subject to money laundering;

The conduct (if committed intentionally) that is punishable as money laundering is defined. This includes the conversion or transfer of property; the concealment or disguise of the true nature, source or ownership of property; and the acquisition, possession or use of property that was derived from criminal activity;

[7] Jens H. Kunz: Key elements of the 4th EU Anti-Money Laundering Directive https://www.financierworldwide.com/key-elements-of-the-4th-eu-anti-money-laundering-directive/#.WtMmZC5uaUk (15. 04. 2018.)

Member States are obliged to make punishable certain types of "self-laundering," i.e., if the money laundering is committed by the perpetrator of the criminal activity that generated the property;

Certain factors that may hinder conviction have been excluded. In this context, the Directive foresees that conviction should be possible (1) without a prior or simultaneous conviction for the criminal activity from which the property was derived, (2) without it being necessary to establish precisely the factual elements or circumstances relating to that criminal activity, including the identity of the perpetrator, and (3) irrespective of the fact that the criminal activity was committed in another country.

Requirements for "knowledge" of the money launderer have been lowered. The Directive does not distinguish whether the property has derived directly or indirectly from the criminal activity and whether any intentions or knowledge of the proceeds can be inferred from objective, factual circumstances.

Member States are obliged to punish aiding and abetting, inciting, and attempting a money laundering offence as defined in the Directive;

Member States must ensure that the money laundering offences are punishable by a maximum term of imprisonment of at least four years;

Member States must also provide for additional sanctions or measures against natural persons, e.g., fines; temporary or permanent exclusion from access to public funding, including tender procedures, grants, and concessions; temporary disqualification from practicing commercial activities; and temporary bans on running for elected or public office;

The Directive sets out aggravating circumstances, which the Member States must take into account when persons are sentenced. They apply to cases linked to criminal organizations or to the exercise of certain professional activities. Furthermore, Member States are entitled to define aggravating circumstances based on the value of laundered property or the nature of the offence (e.g., corruption, sexual exploitation, drug trafficking, and terrorism);

Conditions are also set out for the liability of legal persons and possible sanctions against them;

Member States must take the necessary measures to ensure the freezing or confiscation of the proceeds of crime in accordance with Directive 2014/42/EU;

Finally, clearer rules define which Member State has jurisdiction and how conflicts of jurisdiction can be resolved."[8]

[8] https://eucrim.eu/news/new-directive-criminalisation-money-laundering/ (14.02.2019.)

THE CURRENT HUNGARIAN AML POLICY

In the former decade the number of the money laundering investigations in Hungary was not so high. In the official crime statistics, we could see 5-10 cases in a year.

Today something is happening, only in Budapest there are more than 100 money laundering investigations. The number of the reported suspicious transactions was around 10.000 in the last decade every year. The new AML regulation is effective enough, in the Act LIII of 2017 and in the Hungarian Criminal Code (Act. C. of the year 2012) as well.

We had a MONEYVAL monitoring process in 2016, the results were published in December 2017[9]. "As a result of Hungary's progress in strengthening its framework to tackle money laundering and terrorist financing since its mutual evaluation in September 2016, MONEYVAL has re-rated the country on 13 of the 40 Recommendations. Hungary has been in an enhanced follow-up process, following the adoption of its mutual evaluation, which assessed the effectiveness of Hungary's anti-money laundering and counter-terrorist financing (AML/CFT) measures and their compliance with the Recommendations by the Financial Action Task Force (FATF). In line with MONEYVAL's rules of procedure, the country has reported back to MONEYVAL on the progress it has made to strengthen its AML/CFT framework. This report analyses Hungary's progress in addressing the technical compliance deficiencies identified in the mutual evaluation report. The report also looks at whether Hungary has implemented new measures to meet the requirements of FATF Recommendations that have changed since the country's 2016 mutual evaluation. MONEYVAL decided that Hungary should remain in enhanced follow-up and next report back in December 2018 as per Rule 23, paragraph 1 of MONEYVAL's 5th round rules of procedure."[10]

In the interest of the struggle against money laundering as an objective, we need to cooperate with other countries and international organizations. With respect to this, we have already undertaken several international obligations but we are to be ready to conclude further agreements or the reinforcement of the earlier ones; at the same time, we are also to initiate such.

We cannot give up on the development and continuous improvement of the legal regulations in view of the fact that the problem of money laundering cannot be solved through exclusively criminal law means. Criminal law – as we can unfortunately experience nowadays – is not able to remedy the deleterious

[9] https://rm.coe.int/moneyval-2017-21-hungary-1st-enhanced-follow-up-report-technical-compl/1680792c61 (15. 04. 2018.)

[10] https://www.coe.int/en/web/moneyval/home (15. 04. 2018.)

social phenomena; furthermore, it cannot even solve the problems emerging in connection with crime. Crime is a social phenomenon in connection with which criminal law – to use a medical expression – can only provide symptomatic treatment. In spite of this, this branch of law cannot be neglected or replaced by anything else either. In the fight against money laundering, however, we should give priority to non-criminal law means; that is, we should develop the financial system in such a way that money laundering in Hungary would be possible only through extreme difficulties. This way, a great percentage of "unclean money" would avoid the country and would move towards areas where it would not meet such strong opposition. If we achieve this, while simultaneously taking part in the cooperation conducted for the fight against money laundering, we can say that we have performed the obligations we have undertaken internationally. However, we can still not lean back as the methods of money laundering are continuously being perfected; perpetrators are developing newer and newer techniques. As far as we can see, the fight will never end, consequently, the main aim can only be that we are a step ahead of the perpetrators, and we preserve this step for the longest possible time.

THE CORRELATION BETWEEN THE AML/CFT REGULATION AND THE CRIMINAL LAW PREVENTION OF THE STOCK MARKETS

"Crime never stops: criminals continue to find different ways to circumvent the measures that have been put in place to combat money laundering and terrorist financing. Technological innovations introduce efficiencies, but also provide opportunities for criminals, and new challenges for countries who need to regulate the use of these technologies."[11]

Not just only the anti-money laundering prevention, but also new EU regulation in the area of capital market regulation came into force last year.Since03.01.2018 came into force „New unified EU rules for the restructuring of the capital market and better protection of investors in Hungary." (MiFID II Directive and MiFIR Decree).The protection of Investor is enhanced by increasing the transparency of capital market constructions. Before concluding investment advisory contracts, service providers and intermediaries should not only assess the knowledge of clients' risk, but should also present the yields of the product being offered and "tailor-made" their costs to customers. Service providers are obliged to indicate how much commission

[11] Cryptocurrency Anti-Money Laundering Report, 2018 Q4 Cryptocurrency Intelligence January 2019. (16 p.)
https://ciphertrace.com/wp-content/uploads/2019/01/crypto_aml_report_2018q4.pdf (14.02.2019.)

they receive for each fund they distribute from that fund manager. From that time the customer can only be charged for the provided service. Transparency can make it clear to customers if a distributor offers products primarily to investors for which he would receive higher commissions. The prevention of money laundering and the protection of the capital market are also linked at several points in Hungary and other developed countries. On one hand, it is necessary to prevent damage to market players and their customers if they do not take risks seriously. On the other hand, insider trading and other capital market abuses and money laundering are reported under similar mechanisms in developed countries.

As regards both prevention of money laundering and insider trading and other capital market abuse, the relevant legislation stipulates that risks need to be identified in the context of monitoring, although the way in which it is implemented is different.

In the case of insider trading, the monitoring is carried out primarily by the National Bank of Hungary, in the case of money laundering it is the responsibility of the service providers (banks, insurers, accountants, lawyers, etc.).Generally can be observed the tightening of both financial and criminal law during and after the economic crises. For that is a perfect example are: 2018 5th AML / CFT EU Directive and also 2018 MiFID II and MiFIR Decree. In 2001, the Enron scandal series of crimes that led to the failure of audit firms also affected the market. Majority of investors turned to real estate market in 2001 due to accounting scandals. Investors were at least not forced to trust the auditors, in the residential real estate market. The consequences are well known: in 2007, the crisis began with the burst of the real estate bubble. Too many loans were given to unworthy, poor social groups, which in itself led to the proliferation of certain forms of crime (such as credit fraud).The public did not see it in advance, nor does it fully understand the crisis, as is the case with many key decision-makers, because traditional economic theories do not contain any findings about spiritual factors. Traditional economic theories exclude changing thought patterns and business action patterns that are the cause of the crisis. They do not even deal with the loss of trust and faith. They exclude equity, which hinders price and wage flexibility, which could stabilize the economy. They do not deal with corruption and the sale of poor-quality products during the boom, nor does it play when the bubble bursts.

CONCLUSION

We have criminal law tools to combat the global economic crisis that broke out in 2007-2008 include criminal law, in particular international

cooperation against the offshore industry, which ultimately originated from the US after the outbreak of the crisis.

According to some estimations, the world's GDP, taking stock and other virtual securities, is $ 500,000 billion, while the virtual / speculative "bit-money" is only $ 50,000 billion. More than half of these capital flows take place with the help of offshore companies. The offshore issue is also closely linked to both the capital market and money laundering, but it may be the subject of another study.

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